No. 291.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiffs in Error,
vs.
CHUNG SHEE,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

GEORGE J. DENIS,
U. S. Attorney Southern District of California,

FRANK G. FINLAYSON,
Assistant U. S. Attorney,
Attorneys for Plaintiffs in Error.

In Error to the United States District Court, for the Southern District of California.

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I.

Defendant's Right to Enter Not an Issue before Judge Bellinger.

In his "statement," counsel for defendant in error says that the main issue tendered by defendant in error, on her application for the writ of *habeas corpus* before Judge Bellinger, was as to her right to enter this country. In the first place, we respectfully submit that rights are not tendered as "issues" in any pleading.

Issues, technically speaking, are issues of fact, from which a right may flow from the application of the law of the case to the facts alleged and tendered as issues; and we submit that, in the instant case, the main *fact*, tendered by defendant in error in her petition to Judge Bellinger for the writ of *habeas corpus*, and upon which she based her alleged right of entry, was the fact of her marriage to the Portland merchant, Chung Chew. But this fact was found against the petitioner—defendant in error here [Tr. pp. 46-48].

In the second place, we submit that, for the reasons given in our opening brief, Judge Bellinger, on said application for the writ of *habeas corpus*, was not called upon to pass upon the applicant's right to enter the United States, or her title to be here, but was restricted to an adjudication of the validity of the order of the collector denying to the petitioner the right to enter. Petitioner was restrained of her liberty under the order of the collector. This was the point, and, so far as this case is concerned, the only point decided in the Jung Ah Lung case. Being so restrained of her liberty, the question, and the only question, properly before Judge Bellinger was: Is the order of the collector a valid order? *i. e.*, Is the order of the collector free from all *jurisdictional* vices? If free from jurisdictional defects, the order of the collector was a valid order, and the restraint of petitioner a lawful restraint. This conclusion is not dependent, in any manner, upon any provision of the Chinese exclusion acts, but rests entirely upon the general law relative to *habeas corpus*. It rests upon the

following principles. (1) Where one is restrained under the order of an officer of the government, authorized to make an investigation into the facts, and to make the order in question, such order, if made after such investigation, is, like any other judgment, unassailable on collateral attack; (2) A review of such order on *habeas corpus* is a collateral attack; (3) Therefore, if the order is a valid order, it cannot be set aside in a *habeas corpus* proceeding; (4) If free from *jurisdictional* defects, the order is valid; *i. e.*, it is not an absolute nullity, and the person restrained of his liberty thereunder, cannot be freed in such collateral proceeding; (5) If the order is a nullity, *i. e.*, if jurisdictional vices inhere therein, the restraint thereunder is "an unlawful restraint," and the court, on *habeas corpus*, may set him free *from all further restraint under that particular order.*

If the foregoing is a correct statement of the principles of the law applicable to *habeas corpus* proceedings, it follows that, in a proceeding like that before Judge Bellinger, the court, in the language of Mr. Justice Jackson in the Pridgeon case, is restricted to an "inquiry addressed not to errors, but to the question whether the proceedings and the judgment rendered therein are for any reason nullities." If the court, on such inquiry, holds that the order of the collector is a nullity, then the Chinaman can never more be restrained of his liberty *under that particular order.* The order of the court, on *habeas corpus*, is *res adjudicata*, and a final determination of the absolute invalidity of that particular order. This, and this only,

is the rule of law announced by Mr. Freeman in his work on Judgments [1 Freeman on Judgments, sec. 324], and by the other text writers and decisions cited by counsel for defendant in error, and in the opinion of the learned Judge of the court below. But, while the order of discharge in the *habeas corpus* proceeding is a final and conclusive determination of the invalidity of the order under which the restraint was made, it is not a final, or, in fact, any determination of the right involved in the inquiry before the officer by whom the order was made. The case is precisely like the case of a discharge on *habeas corpus* from imprisonment under a void process. As said by Mr. Justice Story in the Milburn case [9 Pet. 704], "a discharge of a party under a writ of *habeas corpus* from the process under which he is imprisoned discharges him from any further confinement under that process, but not under any other process which may be issued against him under the same indictment" So, in the instant case, the discharge of the defendant in error, by order of Judge Bellinger, from detention under the order of the Oregon collector, discharged her from any further confinement under that particular order, but not under any other order that might be made after a proper investigation into her right to come here. The collector himself might make such re-investigation, just as in the Day case, Judge Brown said that the immigration commissioners must hear any additional evidence [*In re* Day, 27 Fed. Rep. 678]. Or, by virtue of the provisions of the 13th section of the Chinese exclusion act of September 13, 1888 [25 Stat. at L. p. 476], or of the 6th section of the Geary act [act of May 5, 1892, 27 Stat. at L. p. 25],

as amended by the McCreary act [act of Nov. 3, 1893, 28 Stat. at L. p. 7], a justice, judge or commissioner of the United States, in the original proceeding therein provided for, might re-investigate the right to come here. As we view it, such original proceeding, provided for by said sections of said exclusion acts, is intended as a cumulative remedy, and in addition to the necessarily inadequate investigation made by the collector at the time of arrival of the Chinese passenger.

We submit, therefore, that Judge Bellinger's decision was not an adjudication upon the right of the defendant in error to enter the United States, but was simply an adjudication that the order of the collector, adjudging the non-existence of such right, was extra-jurisdictional and void. The existence or non-existence of this right might be disclosed by other and further evidence to be adduced before the collector, or before a justice, judge or commissioner in an original proceeding commenced under said sections of the exclusion acts, and the discharge from confinement under the order reviewed by Judge Bellinger, would not preclude a new order by the collector, made on such additional evidence, or an order by a justice, judge or commissioner, made in a proceeding authorized by section 13 of the act of September 13, 1888, or by section 6 of the Geary act.

II.

Decisions under Immigration and Contract Labor Acts Applicable Here.

In respect to the cases cited by us—*in re* Day, *in re* Cummings, *in re* Dietze, *in re* Vito Rullo, and *in re*

Bucciarello—defendant in error objects that they are cases arising under a statute different from that involved in the inquiry herein. The cases in question were cited by us in our opening brief to support the proposition that "the jurisdiction of the collector to make the order, and not the defendant's title to residence, was the question presented before Judge Bellinger." It is true that these cases arose under the acts to regulate immigration, and not under any one of the Chinese exclusion acts. But, our contention herein is in no wise dependent upon any provision of the Chinese exclusion acts. Our contention is that, under the *Habeas Corpus* Act—sections 571 *et seq.* of the Revised Statutes—the court, in a *habeas corpus* proceeding, is confined to an inquiry into the jurisdiction of the collector to make the order in question, and may not inquire into the merits of the case; that, as this principle of law is independent of any provision of any immigration act, contract labor act, or Chinese exclusion act, it is equally applicable in cases arising under any one of these acts; and that, therefore, if, in cases arising under the immigration act, the court, on *habeas corpus*, may not determine the immigrant's right to land, but is limited to an inquiry into the jurisdiction of the commissioner to make the order refusing permission to land—as stated by Judge Brown in the Rullo case, 43 Fed. Rep. 62—then, for the same reason, the court's inquiry in a *habeas corpus* proceeding, arising in connection with the execution of the Chinese exclusion acts, is equally restricted, and the decision therein does not determine the right involved in the order made by the collector of customs. Our position is based upon the general principles of

law relative to the writ of *habeas corpus*, and is in no wise affected by any provision of any immigration or exclusion acts.

III.

Section 12 of Act of September 13, 1888, Did Not Attempt to Take from the Courts any Power to Adjudicate upon "the Right of Any Chinese Person to Enter the United States."

Defendant in error argues: (1) That Congress, by section 12 of the act of September 13, 1888, sought to take from the courts, not the power to determine the collector's jurisdiction to act, but the power of adjudicating upon "the right of any Chinese person to *enter* the United States" [Defendant's Brief, p. 4]; (2) That, as this section of the act never took effect, the power of the courts to adjudicate upon "the right of any Chinese person to enter the United States" must still exist. The vice of this argument consists in the assumption that by said section 12 of the act of September 13, 1888, Congress sought to take from the courts the power to adjudicate upon "the right of any Chinese person to enter the United States." The courts never had that power; section 13 of the act—a section in force—gave to the courts the power to determine the right of the Chinaman to be and to remain in this country after entry. The only power of review possessed by the courts prior to the act of September 13, 1888, was the power to review the order of the collector on *habeas corpus*. But that power did not involve the power to de-

termine the *right* of any Chinese person to enter the United States. It involved simply the power to determine the validity of the order of the collector denying the existence of such a right. The language of section 12 of the act of September 13, 1888, that "the collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States; and his decision shall be subject to review by the Secretary of the Treasury and not otherwise," does not imply that, prior to the passage of the said act, the courts had power to inquire into the right of any Chinese passenger to enter the United States; *i. e.*, to inquire into his title to residence. It simply implies that, prior to said act, the courts, on *habeas corpus*, had the power to review the order of the collector; a power which we admit they have always possessed under the *Habeas Corpus* Act—as decided in the Jung Ah Lung case—but that power, we submit, has always been confined to an inquiry into jurisdictional matters. The object of the above-quoted provision of section 12 of the act of September 13, 1888, was to take away this power to review the collector's order on *habeas corpus*. This was the effect of the act of August 18, 1894—Lem Moon Sing *v.* United States, 158 U. S. 538—and we submit that, in this respect, section 12 of the act of September 13, 1888, and the act of August 18, 1894, are alike. Each act aims to take away the power to review on *habeas corpus*, but if that power has always been limited to the confines laid down in the immigration cases, and the other cases cited by us, it follows that the failure of section 12 of the act of September 13,

1888, to take effect does not give to the courts, in a *habeas corpus* proceeding, the power to adjudicate the right or title of any Chinese passenger to enter the United States.

IV.

Position of the Government in the Loo Way Case Not Inconsistent with Its Present Position.

The position of the Government in the Loo Way case is in no wise inconsistent with the Government's position here. In the Loo Way case the point was made by plaintiff in error that the decision of the collector allowing him to land was a conclusive determination of his right to land, and was not open to any future inquiry by any justice, judge or commissioner in any proceeding commenced under either section 13 of the act of September 13, 1888, or under section 6 of the Geary act as amended by the McCreary act. But, the very purpose of the proceeding authorized by said section 13 of the act of September 13, 1888, and by said section 6 of the Geary act, is to determine the question of the Chinaman's right or title to be and to remain in this country. Whereas, under the *Habeas Corpus* Act —the sole authority for the issuance of the writ of *habeas corpus*—the power of the court is limited to an inquiry into the jurisdiction of the collector to make the order under review. If the order is a nullity, the restraint thereunder is unlawful, and the petitioner should be discharged. If the collector had authority and his order is not a nullity, his decision upon the evidence before him is not open to inquiry on *habeas corpus*;—

aliter where the right to be and to remain here is the subject of inquiry in an original proceeding commenced under section 13 of the act of September 13, 1888, or under section 6 of the Geary act.

V.

The Collector Exercises Judicial Functions.

The collector, *pro hac vice*, is a judicial officer; *i. e.*, he exercises judicial functions, when, in obedience to section 9 of the act of May 6, 1882 [22 Stat. at L., p. 58], he proceeds to examine Chinese passengers, comparing the certificates with the list and with the passengers, and passes upon the right of any passenger to land in the United States. Said section 9 of the act of May 6, 1882, prescribes the duties of the collector. In this connection, it provides that "no passenger shall be allowed to land in the United States from such vessel in violation of law." The provision directing the collector to examine the passengers, and the provision that no passenger shall be allowed to land in violation of law, are *in pari materia*, and the latter clause means that the *collector* shall allow no passenger to land in violation of law. This being so, that officer exercises most important judicial functions, and, like the immigration commissioners referred to in the Day case and in the other cases heretofore cited, he is a *quasi* judicial tribunal. It is true that in the Jung Ah Lung case the Supreme Court said that the collector is "the *executive* who is to perform the duties prescribed," etc. But the court nowhere

says, in that or in any other case, that said executive officer is not engaged in the performance of judicial functions when he examines the passengers and passes upon their right to land in the United States. The court simply said in that case that the collector belonged to the executive branch of the government. But executive officers often act as a tribunal of a *quasi* judicial character.

Johnson *v.* Towsley, 13 Wall. 72;
Smelting Co. *v.* Kemp, 104 U. S. 636;
U. S. *v.* Minor, 114 U. S. 233;
Heath *v.* Wallace, 138 U. S. 573, 585;
McCormick *v.* Hayes, 159 U. S.—Bk. 40 L. C. Ed.

In the Lee Hoy case [United States *v.* Lee Hoy, 48 Fed. Rep. 825], Judge Hanford said: "But, by a line of decisions of the Supreme Court, a general principle has become fixed as part of our national jurisprudence. It is this: When an officer or special tribunal is expressly empowered to receive and examine proofs, and decide any question of fact necessary to be determined in the course of the administration of the government or execution of the laws, and no power of review is given the courts by any statute, the finding of facts made by such officer or special tribunal pursuant to such authority is conclusive upon the parties affected and upon the courts, unless it can be impeached for fraud."

This, we submit, is a correct statement of the law, and is in no wise affected by the opinion of this court in the same case on error—United States *v.* Gee Lee, 50 Fed. Rep, 271—since this branch of Judge Hanford's

opinion was not dependent upon any part of the act of September 13, 1888. This branch of the opinion is a conclusion that flowed from the fact that the collector had power to examine passengers, and to decide that no passenger should land in violation of law—a power conferred upon the collector by section 9 of the act of May 6, 1882 [22 Stat. at L. p. 58]. This power on the part of the collector, existing by virtue of said act of 1882, existed at the time of Judge Hanford's decision, and was continued for ten years by the act of May 5, 1892. The error in Judge Hanford's opinion was the assumption that the last clause of section 12 of the act of September 13, 1888, was in force. The first part of said section 12 of the said act of September 13, 1888, *i. e.*, all of the section except the provision making the collector's decision reviewable by the Secretary of the Treasury and not otherwise, was substantially identical with said section 9 of the act of May 6, 1882. Had the last clause of said section 12 of the act of 1888 been in force, the collector's decision would not have been subject to review by the courts even on *habeas corpus*—as held in Lem Moon Sing *v.* United States [158 U. S. 538], and Ekiu *v.* United States [142 U. S. 651]. But whether subject to review or not, the collector exercises judicial functions, and is a *quasi* judicial officer. In the one case, his judgment is final; in the other case, it may be reviewed by the courts on *habeas corpus* for the purpose of ascertaining whether the judgment of the officer is a valid judgment or a nullity.

VI.

The Language Used in the Opinion in the Jung Ah Lung Case, Relative to the Question of the Chinaman's Title to be Here, does not Imply that His Title to be Here can be Adjudicated in a Habeas Corpus Proceeding.

In the Jung Ah Lung case, the court used the language following, to-wit: "The question of his title to be here can certainly be adjudicated by the proper court of the United States, upon the question of his being allowed to land." Counsel for defendant in error says that this language means that, upon application for leave to enter, his right to so enter can then and there be adjudicated by the court. If counsel means that the language quoted implies that the Chinaman's right to enter, or his title to be here, can be adjudicated in a *habeas corpus* proceeding at the time he seeks to enter, we must respectfully dissent. An examination of the context shows that the above quoted language of the court in the Jung Ah Lung case was used in connection with a proceeding before a justice, judge or *commissioner*. The only proceeding authorized to be had before a justice, judge or commissioner is the original proceeding authorized by section 13 of the act of September 13, 1888, and by section 6 of the Geary act, the act of May 5, 1892. Since when has a *commissioner* possessed the power of issuing the writ of *habeas corpus*, or of giving a judgment in a *habeas corpus* proceeding?

VII.

Cases Cited by Defendant in Error Inapplicable.

The cases cited on pages 17-18 of defendant's brief do not touch the question here. Those cases are divisible into two classes, and merely decide what is admitted here. One of these classes of cases simply decides that where parents try their title to the custody of a child in a *habeas corpus* proceeding, the judgment is a final and conclusive adjudication of the right to the child. As said by Mr. Justice Field in the Cuddy case [40 Fed. Rep. 65], such cases are exceptional. The other class of cases cited by defendant, *e.g.*, *in re* Crow, *ex parte* Jilz, and Yates' case, simply decide that after a party has been once discharged on *habeas corpus*, he can not be arrested again on the *same* process or order.

RESUME.

In conclusion, we respectfully submit that the authorities sustain the following propositions:

1. That under section 9 of the act of May 6, 1882, the collector exercises judicial functions, and, in doing so, is an officer or tribunal of a *quasi* judicial character.

2. That prior to the act of August 18, 1894, and at the date of the *habeas corpus* proceeding before Judge Bellinger, the courts had the power to review the order of the collector on *habeas corpus*.

3. That this power to review the order of the collector is derivable solely from the *Habeas Corpus* Act—

sections 751 *et seq.* of Revised Statutes—and is not affected, one way or the other, by the Chinese exclusion acts passed prior to August 18, 1894.

4. That the order of the collector, denying to a Chinese passenger permission to land, is the judgment of an officer exercising judicial functions, and of a *quasi* judicial character.

5. That, on *habeas corpus*, a court reviewing such order or judgment of a collector, is confined to an inquiry into the *jurisdiction* of the officer, and whether he has kept within the legal limits, and proceeded according to law.

6. That in such *habeas corpus* proceeding, the court may not inquire into the right or title involved in the order made by the collector, further than to determine whether the order itself is a valid judgment or a mere nullity; because if it is a nullity there is no lawful authority for the petitioner's restraint, and such restraint then becomes an unlawful restraint, and within the purview of section 753 of the Revised Statutes.

7. That if the court holds, in such *habeas corpus* proceeding, that the order of the collector is extra-jurisdictional, and for that reason a nullity, and discharges the petitioner, such discharge is a final and conclusive adjudication that that particular order, under which the Chinaman was restrained of his liberty, was a nullity, and the Chinaman can never again be kept in custody under that particular order. Also, that this is the sense in which Mr. Freeman, and the other writers, use

the expression that a discharge of a prisoner on *habeas corpus* is *res adjudicata*.

8. That the court, in such *habeas corpus* proceeding, does not pass upon the merits of the question before the collector, and its decision discharging the Chinaman from further custody under the order of the collector, is not a decision upon the merits of the question before the collector, *i. e.*, upon the right or title of the Chinaman to be here.

9. That the judgment of discharge on *habeas corpus* does not preclude a further restraint under either (1) a new order of the collector, based upon new and additional evidence; or, (2) an order of a court made in an original proceeding commenced under section 13 of the act of September 13, 1888, or under section 6 of the act of May 5, 1892, *i. e.*, a proceeding such as that in which the defendant in error was proceeded against in the court below.

Respectfully submitted,

GEORGE J. DENIS,
United States Attorney,
Southern District of California.

FRANK G. FINLAYSON,
Asst. U. S. Attorney.